No. 21,063

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM S. BENNETT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

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Subject Index

Table of Authorities Cited

Cases

Rules

Statutes

Miscellaneous

Texts

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STATEMENT OF JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California, Southern Division thereof, is predicated upon Section 2113 (b) of Title 18, United States Code.

This Court's jurisdiction to review the final judgment of the Court below is seen, inter alia, in Sections 1291 and 1294, Title 28, United States Code.

THE STATUTE INVOLVED

Section 2113 (b) of Title 18, United States Code, in effect at the time of the activities denounced by the Indictment, reads (and read), as follows:

"(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100.00 belonging to, or in the care, custody, control, management or possession of any bank, or any savings and loan association, shall be fined not more than $5,000.00 or imprisoned not more than ten years, or both; or

"Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100.00 belonging to, or in the care, custody, control, management or possession of any bank or any savings and loan association, shall be fined not more than $1,000.00 or imprisoned not more than one year, or both."

THE QUESTION INVOLVED

Can the scope of matters covered by Section 2113 (b) of Title 18, United States Code, be enlarged to include activities other than a *taking and carrying away of money or property from a bank against the will and without the consent of its custodian?*

THE TRIAL OF VARIOUS ISSUES LEADING TO JUDGMENT IN THE COURT BELOW

William S. Bennett, the present appellant, was indicted in Criminal Action No. 40467, United States District Court, Northern District of California, Southern Division thereof, as a co-defendant with Don C. Silverthorne who had been the president and

he person in active control of the now defunct San Francisco National Bank.

The two were indicted upon 39 counts out of which, generally, they were accused of entering into a conspiracy for misapplication, etc. of bank funds and of the substantive crimes denounced by Section 656 of Title 18 (misapplication of bank funds) and of Section 2 of the same Title (aiding and abetting).[1]

The then defendant Bennett was acquitted of all counts except Count Two of the Indictment, specifying a violation of Section 2113 (b) of Title 18, United States Code, denominated "bank larceny".[2]

This Count read as follows:

"The Grand Jury further charges: That

"1. The Grand Jury realleges each and every allegation contained in paragraphs one and two of Count One of this Indictment as though fully set out herein.

"2. On or about January 22, 1964, in the City and County of San Francisco, State and Northern District of California, the defendant William S. Bennett did take and carry away, with intent to steal and purloin from the San Francisco National Bank, certain money aggregating $8000 belonging to the bank, accomplished as follows:

"On or about January 23, 1964, one William R. Atkinson applied to the bank for a loan in the

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(Note): References are to Reporter's Transcript, except where otherwise noted.

[1]Clerk's Transcript of Record, Indictment.

[2]Clerk's Transcript of Record, 460 et seq.

amount of $50,000 and the defendant Bennett acted as an intermediary between the said Atkinson and the said Silverthorne. In such capacity, the defendant Bennett advised the said Atkinson that there would be a loan fee or point charge of $8000. In payment of said charge the said Atkinson executed and delivered to defendant Bennett a check payable to the San Francisco National Bank in the amount of $8000 dated January 22, 1964. The defendant Bennett thereafter unlawfully cashed the above check in exchange for a cashier's check on January 23, 1964, in the amount of $8000. The said defendant Bennett thereafter on January 27, 1964, deposited the proceeds of said cashier's check into his personal account under the name of Suisun Properties from which he later withdrew the said sum and converted it to his own use and the bank lost custody and control thereof."

The verdict of the trial jury was returned on February 18, 1966, and judgment was entered upon it on March 4, 1966, at which time the trial judge, Honorable Charles L. Powell, denied motions made pursuant to Rules 29 and 33 of the Rules of Criminal Procedure.[3]

SPECIFICATIONS OF ERROR

1. The trial Court erred in denying the motion of the then defendant Bennett for judgment of acquittal made pursuant to Rules 29 and 33 of the Rules of Criminal Procedure in respect of Count Two of the

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[3]Clerk's Transcript of Record, 464.

Indictment, the count upon which the present appellant was convicted.

2. The verdict of the jury adverse to the present appellant on Count Two of the Indictment was not supported by substantial evidence in that, inter alia, Section 2113 (b) of Title 18, United States Code, refers to common law larceny and involves the trespassory taking of another's property where the owner does not intend to pass title and possession to the taker; there was no such evidence offered in support of Count Two at the trial.

A. Congress did not intend to include within the scope of Section 2113 (b) the common law crime of *obtaining property by false pretenses* nor is such crime within the purview of the statute.

3. There was no evidence out of which the jury could have found that the present appellant had and possessed specific criminal intent described by the Court's Instruction No. 25 which informed the jury that:

". . . The money must have belonged to the bank"

and that

". . . The defendant took and carried away the money with intent to steal and purloin".

4. The Court erred in refusing to charge the jury according to proposed instructions 9 and 9a of the then defendant Bennett in relation to the same Count Two of the Indictment, exceptions having been duly taken:

Instruction No. 9

"Re: *Indictment, Counts 2, 3, First Atkinson Loan*

"In Count 2 of the Indictment, the defendant Bennett is charged with unlawfully cashing a check for $8,000.00, given him by the borrower, Atkinson, as a payment for fee, or points, and with obtaining in exchange therefor, a Cashier's Check in the sum of $8,000.00.

"Of course, if this transaction were not unlawful, you will find the defendant Bennett not guilty. In determining whether the obtaining of the Cashier's Check, under such circumstances, was indeed unlawful, you are entitled to consider all of the evidence relating to methods prevalent at the San Francisco National Bank at or about the time in question for the purchasing of Cashier's Checks.

"You are also entitled to view all circumstances connected with this transaction including the fact, if it be a fact, that the defendant Bennett repaid the identical sum of $8,000.00 to the San Francisco National Bank as a part of the same fee or points.

"In any event, proof of the unlawfulness of this transaction must be demonstrated to a moral certainty and beyond a reasonable doubt before you can find the defendant Bennett guilty thereof."

Instruction No. 9(a)

"Re: *Indictment, Counts 2, 3, First Atkinson Loan*

"If the jury finds that the Cashier's Check for $8,000.00 was in fact purchased by Atkinson at

the request or suggestion of Bennett, then Bennett must be found not guilty of the charges contained in Count 2."

5. The Court erred in refusing to grant the motion of the then defendant Bennett for a trial separate from the trial accorded his then co-defendant, one Don C. Silverthorne.

THE FACTS OF THE CASE

The conviction which is assailed in this appeal arises out of disclosures which were concomitant to the closing of the San Francisco National Bank in January of 1965. Bennett's business practice of acting as a guarantor in the loans of third persons with San Francisco National Bank for a fee, or consideration, and his returning of a portion of such "loan fee" to the bank focused upon him the attention of investigators who had been assigned to probe the apparent reasons for the San Francisco National Bank's failure.

In a number of loan-instances, the moral merits of which were litigated before the Court below, Bennett would sign a guaranty for an otherwise unsecured loan of bank funds to various investors, builders, etc., although receiving back secondary security himself; additionally, Bennett would impose a substantial loan fee or payment of "points" against the funds received by the borrower from the bank. Ordinarily the check representing such loan fee was drawn to Bennett himself, who, after depositing it, would remit one-half, or

more, to the Order of San Francisco National Bank, as the bank's share. While there was no illegality inherent in the carrying out of the business method described above, the general theory of the Indictment imported an accusation of criminality against Bennett and Silverthorne as follows:

> 1. That Bennett and Silverthorne both knew Bennett's financial condition to be insubstantial in relation to the total amount of the loans he guaranteed; and that
>
> 2. When Bennett tendered his checks to the bank for its portion of the "points", he somehow knew that Silverthorne would manage to misappropriate the money to his own private use.

As seen, Bennett was acquitted upon the general charges epitomized above, but was convicted by the trial jury out of the intendments of Count Two of the Indictment which, while involving the smallest amount of money mentioned in the dossier of accusations, bore the label of "bank larceny". The facts underlying this count differ but slightly from those which we have characterized as the general pattern of loan-guaranty transactions revealed at the trial.[4]

Sometime prior to January 23, 1964, a contractor named William R. Atkinson was introduced to Wil-

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[4]Page 141 et seq.; testimony, William S. Bennett; Bennett had, in the past, engaged in the same type of transaction, that is to say, guaranteeing the loans of borrowers for a consideration with other financial institutions. In 1963, he had a line of credit with Bank of America in excess of $800,000.00. This testimony (see pages 156-159) was uncontradicted. The record also showed that Bennett had complete files on every transaction (page 160 et seq.).

liam S. Bennett by a "loan scout" named Noel Hooper.[5] Atkinson's requirement was a loan of about $50,000.00 and to this end he produced for Bennett, upon January 22, 1964, a financial statement prepared by an accountant showing his net worth to be $771,000.00.[6] Atkinson also executed an assignment for security purposes to protect Bennett on the latter's anticipated guaranty.[7] The Atkinson-Bennett meetings extended over a period of about ten days.[8]

The exact amount of the loan, as granted by the bank to Atkinson, was $58,000.00. While Atkinson originally swore that he did not know the loan was $58,000.00 (rather than his requested $50,000.00) until the money was already deposited in his account,[9] his written agreements, when displayed to him, caused him to admit the contrary.[10]

Additionally, he had written a letter to Bennett on January 15, 1964, setting forth his knowledge that he would have to repay the bank $58,000.00, the $8,000.00 representing the fee, or points.[11]

Atkinson was experienced in such transactions and understood the requirement for the payment of 'points".[12]

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[5]Page 11; testimony of William R. Atkinson.

[6]Pages 13-15; Id.

[7]Page 17; Id.

[8]Page 3 et seq.; Id.

[9]Pages 8, 36; Id.

[10]Pages 32-36; Id.; and see Bennett's Exhibit D as read to the witness.

[11]Id.

[12]Page 16; testimony of William R. Atkinson; nor did Atkinson make any complaint about the amount of the "points" on his receipt of the money (Page 21).

Atkinson, after information concerning the deposit of the $58,000.00 into his account on consummation of the loan had been disclosed to him, wrote his own check for $8,000.00, the fee, or points, drawn to the order of San Francisco National Bank, and gave it to Bennett.[13]

(The conflicts in the evidence in this matter are slight and the statement made last above represents one of them. Bennett testified that he expected the borrower's check for $8,000.00 to be drawn to his own order, as had been the case in numerous other transactions, but that Atkinson had already drawn the check when it was handed to him.[14] The two men were standing in the main office of the bank when the incident transpired.)

Bennett immediately approached a teller's window at the bank, handed the employee Atkinson's check, and requested that a cashier's check be drawn to himself in exchange for it. This was done.[15]

(Here again, the evidence contained a minor conflict. Bennett claimed Atkinson was standing with him when the cashier's check was purchased; Atkinson said he knew nothing about the purchase of the cashier's check.)[16]

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[13]Page 9, et seq.; testimony of William R. Atkinson.

[14]Pages 183-185; testimony of William S. Bennett.

[15]Page 184 et seq.; testimony of William S. Bennett.

[16]Page 10; testimony of William R. Atkinson; on cross-examination of Atkinson it was developed that he had sworn, in a civil action filed in San Francisco Superior Court, that the $8,000.00 constituted an advance payment of interest and had asked sub-

It was an admitted fact, according to bank officials, that the usage of a check drawn to the order of the bank itself was one of the customary methods for purchasing a cashier's check.[17] Another former bank employee testified that her understanding of the transaction was that Atkinson was the actual purchaser of the cashier's check.[18]

In any case, Bennett's possession of any part of the theoretical funds was less than transitory. While he had received the cashier's check for $8,000.00 on January 23, 1964, and had later deposited it into an account of his own, he had, on January 22, 1964, in anticipation of the Atkinson transaction, executed and delivered his own check for $4,000.00 to San Francisco National Bank as a payment to the bank as its share of the loan fee.[19] And, on January 24, 1964, as a consequence of a conversation with Mr. Silverthorne, the bank president, he remitted the entire balance of the fee, that is to say, another $4,000.00, to San Francisco National Bank, also by check.[20] While Bennett's explanation of the latter payment may not be binding upon this Court, it was uncontra-

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stantial damages against the bank, Federal Deposit Insurance Corporation, Silverthorne, Bennett, et al.; see the appellant's Exhibit W which has been reproduced for the scrutiny of this Court.

[17]Page 59 et seq.; testimony of Nancy Priola.

[18]Pages 86, 87, 90-93; this witness, Virginia Richards, had been an Assistant Vice-President of the bank; the form of economic sanctions imposed against her because she had clung to an opinion contrary to the Government's position is shown through pages 109 et seq.

[19]Pages 54-57; testimony of Nancy Priola.

[20]Pages 119-124; Silverthorne admitted his receipt, on behalf of the bank, of the two $4,000.00 checks.

dicted; he said, in essence, that it grew out of a discussion between Silverthorne and himself as to his obligation on their general proration of loan fees. It was similarly uncontradicted that Bennett, out of the same transaction, had, by check, paid an additional sum of $1,000.00 to Noel Hooper, the loan scout, as a finder's fee.[21] Accordingly, the transaction upon which the appellant was convicted was not only profitless but represented an actual loss of $1,000.00.

From the perspective of the statute (Section 2113 (b), Title 18, United States Code) there was no evidence that the particular money had ever belonged to the bank or that it was ever in the bank's ". . . care, custody, control, management or possession . . ."

ARGUMENT

I

SECTION 2113 (b) OF TITLE 18, UNITED STATES CODE IS ESSENTIALLY A REENACTMENT OF THE RULE DENOUNCING LARCENY AT COMMON LAW AND DOES NOT HAVE APPLICATION TO THE FACTS OF THIS CASE.

While the writer has had the benefit of the considerable research devoted to the applicable scope of Section 2113 (b) of Title 18, United States Code, by respective counsel in the case of *LeMasters v. United States* (No. 20376 upon the docket of this Court and presently awaiting decision),[22] there emerges for con-

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[21]Pages 187, 199-202. The Hooper transaction is delineated by the prosecutor on page 202.

[22]James F. Hewitt, Esq., permitted usage of his entire work product.

sideration no reported decision in any American Court which offers a warrant for the enlargement of the statute's sphere of influence to cases even remotely comparable to the facts at bar. In *LeMasters* as well as in the Fifth Circuit's decision in *Thaggard v. United States* (1965) 354 Fed 2d 735, counsel were impelled to concede that the activities of the respective appellants could have constituted the crime of *obtaining money or property by false pretenses.* In the *Bennett* case, it is difficult to indulge such a concession even ex arguendo.

As seen from the briefs of counsel in *LeMasters,* the common law distinguished three separate offenses:

1. *Larceny,* a trespassory taking against the will of the owner;

2. *Obtaining money by false pretenses,* that is to say, acquiring both title and possession through false representations; and

3. *Larceny by trick,* in which, by the route of false representations, possession (although not title) is acquired.

The categories noted above are cited by both text and citations in:

47 Cal. Jur. 2d (1959), Article on Theft, Section 6;

2 Wharton's Criminal Law and Procedure (1957 Ed.), Section 509.

The record before this Court cannot, of course, support an inference of trespassory taking nor will there

be seen the element of fraud which is requisite to the perpetration of larceny by trick.

More importantly, it is implausible, out of our present record, to draw the conclusion that the San Francisco National Bank was ever the owner of the theoretical money involved in the transaction. Definitely, the money was never *possessed* by the bank and logic should not permit the indulging of an inference that *title* to the funds (out of some implied secret intention on the part of Atkinson) could have ever vested in the bank.

The bare fact is that $58,000.00 was in the possession of Atkinson through his account in San Francisco National Bank and that Atkinson had title to such funds until he actively transferred all, or a part of, them. No ingredient of passage of title to the bank can be seen in the admitted facts because the $8,000.00 merely passed from Atkinson to Bennett who had, beforehand, made an advance of a portion of the same theoretical funds to the bank itself. Similarly, the record will not disclose any false representations made by Bennett in the exchanging of checks.

> (Query: If A hands B $8,000.00 in cash asking him to deposit the same in A's bank and B then absconds with the money, it would seem obvious, wouldn't it, that B has stolen from A, and not from the bank?)

Because we can eliminate at once any notion of trespassory taking, since the bank teller intended to pass both title and possession, a further look at the

record would seem to scout, as quickly, the possible notion that the appellant may have committed the crime of obtaining money by false pretenses, which is essentially "cheating", an entirely different crime at common law.

As will be reviewed, infra, the intent of Congress, in enacting Section 2113 (b) of Title 18, United States Code, was a specific one bearing no relation to the transaction now under study by the Court.

Thaggard v. United States, supra, was cited by Government counsel before the Court below as controlling anent our proposals concerning the limited scope of the statute. It is not.

> In *Thaggard,* the dishonesty of the defendant was patent and his conduct indefensible. By mistake, his bank had credited $43,000.00 belonging to another depositor's account to Thaggard; when Thaggard received this information through the route of his monthly statement, he promptly visited the bank and obtained confirmation concerning the erroneous credit. He then drew a check to himself for $43,000.00 and the bank teller, after corroborating the apparent balance again, paid Thaggard the $43,000.00. As would have been expected, the true facts were discovered in about ten minutes and an alarm was sounded for the appellant Thaggard who was subsequently in-

dicted, as Mr. Chief Justice Tuttle said, "under the Federal Bank Robbery Statute" and found guilty.

While (we think) the Fifth Circuit of this Court, because of the amorality of the appellant's position, imported highly technical distinctions to the meaning of the dictum in *United States v. Rogers* (4th Circuit, 1961) 289 Fed.2d 433, its decision affirming the conviction of Thaggard was logically based upon the fact that the trial jury was properly, and precisely, instructed upon the literal language of Section 2113 (b) of Title 18, as follows:

> "In this type of larceny prosecution, by the term, 'by trespass' as I have used it and as the law defines it, means the taking of the property, money here, without the owner's consent. The intention of the owner not to part with title to the money when relinquishing possession of it to the defendant or the receiver, Thaggard in this case, is the essence of the offense of larceny, insofar as this prosecution is concerned. Now the correct distinction in cases of this kind seems to be, under the law, that if by means of any trick or fraud the owner of the property, the bank, the Union Bank and Trust Company, is induced to part with the possession only, *still meaning to retain the ownership,* the taking and removal by such means, where the required felonious intent is present and where the other elements are present, is, under the law, larceny. On the other hand, if the owner intentionally, that is, the Union Bank and Trust Company,

> parts not only with the possession of the goods, the money, but with the ownership in the goods also, the offense of the party obtaining the money will not be larceny under the law in this case, but, if anything, the crime of obtaining money by means of false pretenses and subject to prosecution in the state court."

Thus, the trial jury in *Thaggard* had before it not only a well-stated distinction between *bank larceny* and the crime of *obtaining money by false pretenses* but it was given a philosophical basis, strained but existent, for finding that the bank, in delivering $43,000.00 to Thaggard as a result of his fraud, still meant to retain the ownership of the money.

Accordingly, the *Thaggard* decision, whether or not motivated by the Court's understandable reluctance to permit the appellant to obtain any benefit from his own wrongful conduct, is by no means a mandate for extending the application of Section 2113 (b) of Title 18 to the facts in *Bennett*. As suggested earlier, this is not a matter in which the appellant makes the expedient outcry of being charged under the wrong statute.

The dictum in *Rogers,* as mentioned above, was a clear statement of principle. There, the Fourth Circuit of this Court flatly said:

> ". . . We accept the defendant's premise that paragraph (b) of the Bank Robbery Act reaches only the offense of larceny as that crime has been defined by the common law . . ."

Of clear persuasion is the language of *United States v. Mangus* (1940) 33 Fed. Supp. 596 (N.D. Ind.) where the defendant had been indicted under Section 588 (b) of Title 12, United States Code, the historical predecessor of the statute involved here. This was said:

> "It may be argued that it makes very little difference whether defendant is guilty of larceny or of obtaining money under false pretense, but Congress has limited liability under this criminal statute to whoever takes and carries away with intent to steal or purloin any property of an insured bank. If Congress had intended to cover the present crime it could easily have added to this statute the following words: 'Or whoever obtains money or anything of value by false representations or falsely representing that a tendered check is good, shall be guilty.' This Congress evidently did not intend, or it would have so provided, and, as criminal statutes must be strictly construed, I am convinced that the crime of larceny by trick has not been proved."

And in *United States v. Patton* (3rd Circuit, 1941) 120 Fed.2d 73, the Court held that the common law definition of larceny demanded that there be a *trespassory taking and carrying away* which will not exist where both title and possession to money is obtained by fraud. This was said (page 75):

> ". . . nowhere in the statute is the word 'larceny' defined. It is, however, well settled that when a Federal statute uses a term known to the common law to designate a common law offense and does not define that term, the courts called upon to

construe it should apply the common law meaning . . ."

II

CONGRESS DID NOT INTEND, BY ENACTING SECTION 2113 (b) OF TITLE 18, UNITED STATES CODE, TO PRESENT A NATIONAL COUNTERPART OF THE BREADTH OF ACTIVITY SPECIFICALLY DENOUNCED BY LAWS SUCH AS SECTION 484 OF THE CALIFORNIA PENAL CODE.

The legislative intent which underlay the passage of the law in question is well documented by public reports. Basically, it was legislation introduced in 1934 as part of a plan to curb gangster activities in the United States. Pointedly, it followed an outbreak of bank holdups which, theretofore, had not been accorded pertinent and adequate strictures.

See:

Congressional Record, S. 2841, 73rd Congress, 2d Session, 78 Cong. Rec. 2946-7 (1934).

As it passed the Senate on March 29, 1934, the bill read as follows:

> *Be it enacted etc.,* That as used in this act the term "bank" included any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States.
>
> *Section 2.* Whoever, not being entitled to the possession of property or money or any other thing of value belonging to, or in the care, custody, control, management or possession of, any bank, takes and carries away, or attempts to take

and carry away, such property or money or an (sic) other thing of value from any place (1) without the consent of such bank, or (2) with the consent of such bank obtained by the offender by any trick, artifice, fraud or false or fraudulent representation, with intent to convert such property or money or any other thing of value to his use or to the use of any individual, association, partnership, or corporation, other than such bank, shall be * * *.

Section 3. Whoever breaks into, or attempts to break into, any building or part thereof used as a place of business by any bank, with intent to commit in such building or part thereof so used any offense defined by this act or any felony under any law of the United States or under any law of the State, District, Territory, or possession where such building is located, shall be * * *.

Section 4. (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be * * *.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon, shall be * * *.

Section 5. Whoever, in committing any offense defined in §§ 1, 2 or 3 of this act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or

attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be * * *.

Section 6. Jurisdiction over any offense defined by this act shall not be reserved exclusively to the courts of the United States.

78 Congressional Record, 5738 (1934).

When the bill reached the House of Representatives, t was finally passed in an amended form. As this Court has already seen, all of Sections 2 and 3 were eliminated, Section 4 became Section 2, 5 became 3 nd 6 became 4; (a phrase not important to our argunent was added to the revised Section 3). The bill hen went into conference, a recommendation that the Senate agree to the House draft was adopted and the ill became law on May 18, 1934. Significantly, it was ntitled *Bank Robbery Act of 1934.*

Ch. 304, 48 Stat. 783.

The progress of the enactment from committee raft to actual legislation tells a vivid story. Where he original Senate draft made specific inclusion of he common law crime of *obtaining money by false retenses,* this specific element was eliminated after inal debate by means which clearly do not carry the nference of inadvertence. Language which would ave created an omnibus crime was *stricken,* not nerely omitted.

How then may a reviewer hold that the present tatute applies to the deleted subject matters by hint r implication?

When the law was finally passed, Congress had actually retained only those acts tantamount to taking by force and violence.

Our reference to *Mangus,* supra, recalls the previous existence of Section 588 (b) of Title 12, United States Code. The significance, both historically and from the pure perspective of legislative intent, of those portions of the Senate draft set forth above is illuminated by what happened thereafter. In 1937, Congress passed a law which effected the inclusion of burglary and larceny within the scope of Section 588 (b) of Title 12, United States Code and again *all mention of the crime of obtaining money by false pretenses was omitted.*

See:

Cong. Rec. H.R. 5900, 75 Cong., 1st Sess., 81 Cong. Rec. 2731 (1937);
Ch. 747, 50 Stat. 749.

A further refinement of the foregoing, particularly as it involves the contrasts between Section 2113 (b) of Title 18 and the revised Section 588 (b) of Title 12 is that Congress, in eliminating from the latter statute any mention of *consent of the owner,* followed completely our interpretation of the meanings which should be attached to the evolution of Section 2113 (b) of Title 18 into its present form—viz., since false pretense was originally to be included in the law under Senate draft of the 1934 proposed legislation, the word *consent* was specifically employed because the lawmakers were then offering a distinction between

the two crimes of *larceny,* on the one hand, and *obtaining money by false pretenses* on the other.

So we say, again, that such an element cannot be seen by implication in the present form of Section 2113 (b) of Title 18.

See:

Perkins, Criminal Law (57 Ed.) page 249, et seq.

We also attach considerable strength to the language of Mr. Justice Douglas in *Jerome v. United States* (1943) 318 U.S. 101 in which our thinking finds endorsement out of the following:

> "It is difficult to conclude in the face of this history that Congress, having rejected in 1934 an express provision making state felonies federal offenses, reversed itself in 1937 and through the phrase 'any felony or larceny' adopted the penal provisions of forty-eight states with respect to acts committed in national or insured banks. It is likewise difficult to believe that Congress through the same clause adopted by indirection in 1937 much of the fraud provision which it rejected in 1934.
>
> "But there is not the slightest indication that the interstate activities of gangsters against national and insured banks had broken down or rendered ineffective enforcement of state laws governing all sorts of felonies. On the contrary, the bill introduced in 1937 was much more selective and revealed no purpose to make a comprehensive classification of all crimes against the banks. *Moreover, the run of state felonies—forgery, rape, adultery, and the like—would seem to have*

little or no relevancy to the need for protection of banks against the wholesale activities of the gangsters of that day." (Emphasis supplied.)

It seems redundant to conclude that, under the admitted circumstances by which Section 2113 (b) of Title 18 became law, Congress, had it so intended, could have included omnibus crimes such as those embodied within the scope of Section 484 of the California Penal Code. The fact is that language which would have extended the force of the proposed statute was considered and rejected. The silence of Congress, in this instance, cannot be construed as productive of any implied intent beyond the literal language of the law and it may also be pertinently said that if a logical "loophole" existed in the statute, Congress could have enlarged the bank robbery statute when the entire criminal code was revised in 1948 (such an expansion was specifically enacted where legislative needs were pointed out to Congress in instances such as interstate transportation of stolen vehicles and of stolen property generally).

United States v. Turley (1957) 356 U.S. 407;
Smith v. United States (9th Circuit 1956) 233 Fed.2d 744;
Bergman v. United States (6th Circuit 1958) 253 Fed.2d 933;
Cummings v. United States (10th Circuit 1961) 289 Fed.2d 903.

In finality: A review of the legislative intent demonstrates that the crime of obtaining money by false pretenses was not included in Section 2113 (b) of

Title 18. Even if it were, the facts in *Bennett* constitute neither bank larceny nor false pretenses.

III

INDEPENDENTLY OF THE PURPORTED APPLICATION OF SECTION 2113 (b) OF TITLE 18, THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT ANY CHARGE OF WRONGDOING AGAINST THE PRESENT APPELLANT.

It has been reiterated that Bennett does not merely claim that he was indicted under the wrong statute; his position has always been that *the activities specified by the evidence relating to the solitary count on which he was convicted were not violations of any law at all.*

At the close of the prosecution's case, mindful of the rule allowing the Government every favorable inference at such juncture,

Byrnes v. United States, 327 Fed.2d 825,

a motion under Rule 29 of the Federal Rules of Criminal Procedure was made on his behalf. At this time, although Bennett's two $4,000.00 checks, each drawn to the order of *San Francisco National Bank,* had been marked for identification (his Exhibits AA [g] and AA [h]), the prosecutor had been able to keep the instruments out of evidence proper, even though their authenticity, fact of payment, etc., had been established by prosecution witnesses, on the general ground that they "could have been payments for any one of the projects or obligations of Mr. Bennett

on any number of things that he owed money to the bank for".[23]

However, this exchange took place during the testimony of Alan R. Miller, a Government witness who was a bank examiner for Federal Deposit Insurance Corporation and who sat at the Government counsel table during the entire trial in order to render assistance out of his knowledge of documents and transactions. Since Miller had reviewed all bank records regarding Bennett, including Bennett's Loan Ledger, which at that time had been received in evidence, along with the entire transcript of his bank account, he was in a peculiarly good position to certify that the two $4,000.00 checks were received by the bank for purposes other than "loan payments". As seen, while it was developed through Miller that the two checks were deposited and paid on the same date as the $8,000.00 cashier's check, an interruption by the prosecutor by way of objection, but apparently not culminating in any ruling by the Court, prevented the completion of the record at this point.[24] It was not until the presentation of defense testimony that the two checks were actually admitted to the record and displayed to the jury.[25] Bennett's testimony as to the purpose and usage of the two $4,000.00 checks was not contradicted.

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[23]Pages 76-81; testimony of Alan R. Miller, bank examiner, Federal Deposit Insurance Corporation.

[24]Mr. Brosnahan's objection and later interruption appears on page 79.

[25]Silverthorne admitted receipt of both checks (see pages 119-124) but the second $4,000.00 check (Bennett's Exhibit AA [h]) was not admitted until the testimony of Bennett himself was taken.

The whole gambit of activity, then, under the accusation embodied in Count Two of the Indictment, was as follows:

1. Bennett accepted secondary security for a borrower at San Francisco National Bank, one William R. Atkinson, and agreed to guaranty Atkinson's loan of $58,000.00.

2. The loan of $58,000.00 was actually granted Atkinson and this sum was placed in his account after banking hours on January 22, 1964, and was thus credited to him as of the following day, January 23rd (which probably explains the reason for one of Bennett's $4,000.00 checks to San Francisco National Bank bearing date of January 22).

3. Atkinson drew his own check for "points" to the order of San Francisco National Bank and handed the same to Bennett.

4. The entire custom and method of operation on the loan-guaranty transactions was that Bennett would deposit the borrower's check for the fee, or points, and then make remittance to San Francisco National Bank by his own check.[26]

5. The $8,000.00 Atkinson check was converted into a cashier's check to Bennett's order.

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[26]Bennett had sound practical reasons for insisting that the checks for points be surrendered to him first so that he could then make remittance to the bank. More than once he had been by-passed when the converse happened; there were other instances where borrowers, having been granted loans through the interposition of Bennett as a guarantor, returned and dealt with the bank themselves, in his absence (Pages 173-175, et seq.).

6. Bennett drew against the same check two $4,000.00 checks of his own, each to San Francisco National Bank.

7. Bennett paid the loan scout, Noel Hooper, $1,000.00 as a finder's fee and hence lost that amount out of the whole transaction.

It should be noted, also, that the loan to Atkinson was not spurious. Atkinson paid this loan;[27] his later loans from San Francisco National Bank, involved as we have seen in civil litigation, are not the concern of this record.

Can any significance, invidious or not, be drawn from the small area in which there appears to be a conflict in the testimony, namely, the manner of the procurement of the cashier's check?

First of all, the check bore no endorsement, a matter which scarcely bears the implication of the unusual since the testimony of Melville D. Bennett, the liquidator for Federal Deposit Insurance Corporation, was to the effect that a number of substantial checks drawn by the appellant had been used to purchase cashier's checks at San Francisco National Bank without any endorsement or other marking appearing on the back side of the check to show its usage or ultimate fate.[28]

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[27]See Government's Exhibit 2(a), "Loan Liability Ledger of William R. and Ruth L. Atkinson", which has been reproduced for the scrutiny of this Court.

[28]Melville D. Bennett's testimony on this point appears within pages 131-139.

The Government was able to produce the young teller, Margaret Wu, who had handled the cashier's check transaction. Miss Wu had no memory whatsoever of the event except that, from the papers shown her, she possessed an opinion as to who the legal "purchaser" was.[29] While it is true that Miss Wu contradicted her more experienced superior, Virginia Richards, an Assistant Vice-President at San Francisco National Bank, who had testified that Atkinson, not the appellant, was the purchaser, Miss Wu made it clear that there could have been no impropriety connected with the event when she testified to this effect:

> "Q. You don't remember who brought you that check, do you?
>
> A. No, I don't remember.
>
> Q. Miss Wu, in the course of your work at San Francisco National Bank, if someone brought you a check drawn to the bank, not his own check, but the check of somebody else, and asked to buy a cashier's check with it, drawn to himself, you would require an endorsement of the check, wouldn't you?
>
> A. I require endorsement or I would get okay from my superior."[30]

In other words, it would seem to be clear that, since Atkinson's check was not endorsed, the young lady

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[29]Margaret Wu's testimony on these points appears between pages 204 and 212. Her testimony at page 218 discloses that she remembered nothing about the matter except the recognition of her own handwriting. She did not remember who had brought her the check.

[30]Page 218.

who procured the issuance of the cashier's check, being unacquainted with Bennett, would have complied with all rules and procedures adopted by the bank. She added:

> "Q. So far as you approved it and passed it on, everything you did was proper, wasn't it?
>
> A. As I was told, this was the way I was supposed to do."[31]

Recognizing that this Court cannot resolve conflicts between the statements of witnesses, it is nevertheless not inapropos to comment that Atkinson's own motivation for swearing that he was not the purchaser of the cashier's check in question was developed for the record during the prosecution's case when it was shown that he had filed Action No. 554,998 in San Francisco Superior Court against the bank, the Federal Deposit Insurance Corporation, Silverthorne and Bennett, claiming that the $8,000.00 was an advance payment of interest and that he was accordingly entitled to recover hundreds of thousands of dollars in damages.[32]

Finally, in all of the loan-guaranty transactions recalled by the many counts of the original Indictment, it had been the thrust of the prosecution's case that Bennett, who had complete records on his dealings both with the bank and the borrowers, and who made every fee payment to the bank by check, nevertheless should have known that the person in active

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[31]Page 220.

[32]See Bennett's Exhibit W, referred to, supra.

control of the bank, its president, to whom he usually delivered such checks, had sometimes diverted funds thus obtained from regular banking purposes. Bennett's acquittal upon such counts is persuasive of his utter lack of such guilty knowledge and should remove him from any possible criticism on the present transaction arising out of his delivery of the two $4,000.00 checks.[33]

As Nancy Priola, a Government witness, so clearly testified, the only method for paying any obligation, whatever its nature, to San Francisco National Bank, was by drawing a check to the order of the bank itself in the bank's legal name.[34]

There was also no evidence out of which, in conformity with the language of Count Two, a jury could have concluded that the specific $8,000.00 "belonged to the bank."

One therefore respectfully proposes that the element of criminal intent on the appellant's part does not exist upon the record of the Count Two transaction, that his original motion under Rule 29 for a judgment of acquittal should have been granted, and that, from the whole of the record, there is no *prima facie* proof of the commission by him of any crime.

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[33]See Clerk's Transcript, Verdicts.

[34]Page 60.

IV

THE COURT ERRED, TO THE PREJUDICE OF THE PRESENT APPELLANT, IN REFUSING TO READ TO THE TRIAL JURY PROPOSED INSTRUCTIONS 9 AND 9(a), TO WHICH REFUSAL EXCEPTIONS WERE TAKEN.[35]

For convenience, the proposed instructions of the appellant, as designated above, are repeated:

Instruction No. 9

"Re: *Indictment, Counts 2, 3, First Atkinson Loan*

"In Count 2 of the Indictment, the defendant Bennett is charged with unlawfully cashing a check for $8,000.00, given him by the borrower, Atkinson, as a payment for fee, or points, and with obtaining in exchange therefor, a Cashier's Check in the sum of $8,000.00.

"Of course, if this transaction were not unlawful, you will find the defendant Bennett not guilty. In determining whether the obtaining of the Cashier's Check, under such circumstances, was indeed unlawful, you are entitled to consider all of the evidence relating to methods prevalent at the San Francisco National Bank at or about the time in question for the purchasing of Cashier's Checks.

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[35]We had included in our Specifications of Error, supra, a further point which had been advanced below, namely, the refusal of the trial court to grant this appellant's motion for a separate trial than that involving his co-defendant. The court would have had discretion to grant this motion pursuant to Rule 14 but there is no reported decision offering comfort upon the notion that the denial could constitute an abuse of discretion (see Clerk's Transcript, 57-59, 250-253). While we think the appellant could not have been convicted upon the instant count had he stood trial alone, the truth of the assertion cannot be demonstrated. Judge Powell's efforts to provide a fair trial were outstanding.

"You are also entitled to view all circumstances connected with this transaction including the fact, if it be a fact, that the defendant Bennett repaid the identical sum of $8,000.00 to the San Francisco National Bank as a part of the same fee or points.

"In any event, proof of the unlawfulness of this transaction must be demonstrated to a moral certainty and beyond a reasonable doubt before you can find the defendant Bennett guilty thereof."

Instruction No. 9(a)

"Re: *Indictment, Counts 2, 3, First Atkinson Loan*

"If the jury finds that the Cashier's Check for $8,000.00 was in fact purchased by Atkinson at the request or suggestion of Bennett, then Bennett must be found not guilty of the charges contained in Count 2."

Instruction 9 was a logical direction to the jury in view of the considerable testimony adduced by both sides as to the custom in San Francisco National Bank upon the issuance of cashier's checks, the admission that such checks could ordinarily be purchased without the requirement of any endorsement on the back of the purchasing check, and the fact that the sole issue in conflict was whether Atkinson or Bennett became the legal purchaser of the $8,000.00 cashier's check.

Instruction 9(a) pointedly permitted the jury to make a finding determinative of the case, upon the factual issue last above noted.

In the light of these criticisms, it must be urged that the Court's instruction 25, which merely informed the jury that:

> ". . . The money must have belonged to the bank"

and that

> ". . . The defendant took and carried away the money with intent to steal and purloin."

and which constituted the only instruction relative to the count was woefully insufficient and does not bear comparison with the trial Court's instruction in *Thaggard,* supra, which was accepted as a focal point for affirming that judgment on appeal.

CONCLUSION

Apparent factual issues existed as to the Indictment's numerous counts upon which the present appellant was found *not to be guilty*. In the matter at hand, happily, there can be found no substantial factual issue upon which the jury's conviction could validly have been predicated. Moreover, the record of events concerning the current accusation and the defense offered to it bears no relationship to the theoretical crime denounced by Section 2113 (b) of Title 18, United States Code.

It is respectfully submitted that the judgment convicting the appellant ought to be reversed.

Dated, San Francisco, California,
December 12, 1966.

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Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES MARTIN MACINNIS,
Attorney for Appellant.